UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF WEST VIRGINIA (MARTINSBURG)

JOSEPH NOLAN, ERIC WOOMER, CARLA COBLE, STEPHANIE LAING, and POPPY CHRISMAN, Plaintiffs	*DOCKET NO. 3:08-CV-62
vs.	* Martinsburg, WV
RELIANT EQUITY INVESTORS, LLC, a foreign limited liability company TATUM, LLC, a foreign limited A B & C GROUP, Inc., a foreign corporation, and BLUESKY BRANDS, INC., a foreign corporation, and the following individuals: RICHARD HERBERT, CATHY JO VAN PELT, KIMBERLY MYERS, MICHAEL LUTZ and LARRY MUZZY, Defendants	* July 24, 2009

VIDEO CONFERENCE HEARING TRANSCRIPT

BEFORE THE HONORABLE JOHN P. BAILEY

UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:	Garry Geffert, Esq.
	David Hammer, Esq.
	Martinsburg, WV 25401
For the Defendants:	Craig Boggs, Esq.
	Chicago, IL 60603
	Glenn Hare, Esq.
	Martinsburg, WV 25401.
Court Reporter:	Terry Hamrick, RMR, CRR
	Official Reporter

Proceedings reported by means of mechanical stenography, transcribed utilizing computer-aided transcription.

I N D E X :

(Video conference proceedings in open court with Judge Bailey participating via video.)

THE COURT: I would ask the clerk to call the case, please?

THE CLERK: This is the case of Joseph Nolan, et al. versus Reliant Equity Investors, LLC, et al. Civil Number 3:08-CV-62.

Will the parties please note your appearance for the record?

MR. GEFFERT: Garry Geffert for the plaintiffs.

MR. HAMMER: David Hammer here for the plaintiffs.

MR. BOGGS: Craig Boggs on behalf of defendant Reliant Equity Investors.

MR. HARE: Glenn Hare, also on behalf of Reliant Equity.

MR. POWELL: Bill Powell on behalf of Tatum, LLC.

THE COURT: Gentlemen, can you speak into the mikes?

All right, we're here on plaintiffs' motion to certify a class, which is really two classes; one opt-out class under Rule 23, and a Fair Labor Standards Act opt-in class for group under 29 USC 216(b). I think probably for analysis purposes we need to start with the Rule 23

factors. Numerosity, commonality, typicality, and adequate representation. And I would like to go through each of those factors, but I'm a little concerned that--maybe there's a little bit of quibbling going on here. Who is speaking today for the Reliant?

MR. BOGGS: I am, Your Honor, Craig Boggs.

THE COURT: All right, Mr. Boggs, would you go to the podium, please?

MR. BOGGS: Sure.

THE COURT: First, is there really any issue with regard to numerosity?

MR. BOGGS: Your Honor, I guess the answer to that is, I don't know. As you probably know, Reliant Equity Investors was not the employer, they were an investment advisor to a fund that owned numerous portfolio companies, including Bluesky, which, in turn, owned A B & C. So we have very few facts surrounding the circumstances. And, you know, frankly my guess is that there may not be, Your Honor, but I don't know that and can't really concede that point because we don't know that because there is no evidence. And I think that is our principal point. That in order for there to be a ruling on class certification under Rule 23, there has to be submission of evidence.

And, Your Honor, I think that one of the issues is--we

know, or have a sense at least, based on some testimony that came out in recent depositions and also in connection with the--another class that had been certified in the state court matter, the approximate number of total employees. We don't have any sense of whether those employs are full-time or part-time, which is a very significant issue under WARN, while it is not an issue under the Wage Payment and Collection action in state court.

We also don't have any knowledge about where the employees were working. Which site. And there's three locations. As Your Honor may know, a Berkeley County location, a Jefferson County location, and then an Orange County, Virginia location. And the number of employees at those particular locations, and the number of those employees that are either part-time or full-time, or whether they had worked more than six months in the preceding 12 months prior to the time the WARN notice was due. There is no evidence on any of those issues either.

So, with all due respect, and I understand that we have a sense of what the number of employees, Your Honor, is, I don't think that we know that based on the information that the plaintiffs' lawyers have submitted today.

THE COURT: Well, those--that seems like

information that's more likely to be in the hands of the defendant than it is in the plaintiff.

MR. BOGGS: Well, Your Honor, I think in a normal case you're probably right. But where I think that information probably lies is with A B & C, which is the bankrupt entity. And the trustee, as I understand it, has control over the records. And to date, I'm not aware that Mr. Hammer or any of the plaintiffs' lawyers have subpoenaed those records and obtained them, which is something you would think they would do before moving for class certification.

We don't have access to those records. Again, we are a company that advised another company that owned numerous companies, Bluesky being one of them. Bluesky in turn owned numerous companies. So our client has no access to those records.

I agree with you in a normal Warn Act case, or normal FLSA case, the employer would have those records, but we're not the employer. We are so far removed that we don't have access to that information. And frankly, Your Honor, we haven't subpoenaed the trustee either. But again, it is not our burden on these issues.

THE COURT: Well, it certainly is going to be--it may not be your burden, but I would think those would be facts you would want to know.

MR. BOGGS: Well, Your Honor, they may be, but I think we're better off if the plaintiff hasn't proven those facts, because it is the plaintiffs' burden, so I would be interested in those facts if they come out, and we would probably challenge them. And it is--our principal argument here is that this is very premature without any evidence to support the motion for class certification, other than an eight-paragraph affidavit from one worker who is not even a named rep. Only one of those paragraphs, paragraph 2, of the affidavit relates to the WARN claim. And all it says is: I never received any notice at the Ranson facility. That's all we have in front of Your Honor. We don't have any other evidence from which Your Honor can make a determination and analyze the record it has to do in order to make a determination on class certification under Rule 23. And certainly, no ammunition to then write sort of an order or opinion, which the Court is required to do, analyzing the Rule 23 factors.

And as you saw from our brief, we identified a couple of Fourth Circuit cases. That is the burden, whether or not the plaintiffs may be able to do that sometime down the road, I don't know. They may be able to do it for one facility and not for two others. But at this point, they haven't done it for any of the facilities.

THE COURT: What about typicality?

MR. BOGGS: Even more important, Your Honor. Although there are several named plaintiffs in the case, we understand there's going to be a new plaintiff, poppy Chrisman, who is going to be a sole class rep.. I understand that she worked only at the Ranson facility, did not work at the other two facilities, and from our perspective, each facility requires a different analysis of whether or not the employees that worked there are WARN eligible. Specifically whether there was 50 full-time employees in the six of the 12 months preceding the time that the WARN notice should have been given. Ms. Chrisman may be a very fine representative, I don't know yet, for the people at the Ranson facility. But she has no commonality or interests or typicality with the claims being made by the people in Orange County, Virginia, or at the Berkeley County facility. In fact, she would have no interest in pursuing those.

So, if there's disputes over the facts about the number of employees at those facilities, how many are part-time or full-time, whether they worked 20 hours a week, or more, she is not going to have any interest in any of that. She is only going to be concerned about what happened at the Ranson facility. And for that reason, Your Honor, we don't think that her claim is typical. Her

claim is going to be focused on Ranson. It is not going to be focused on the other two facilities.

There currently is no named plaintiff or class representative that is representing interests of the people at those other two facilities. And I think here the typicality requirement and the adequacy of the class rep., not adequacy of counsel, I'm not challenging that, but the adequacy of the class rep., both are not met, Your Honor. And there's, again, no evidence that they do in fact meet those. And I don't see how they could, given that the people at those different facilities have different interests, different burden of proofs on whether or not their particular facility is going to be eligible for WARN treatment.

And that, frankly, sort of rolls over--that same argument--I don't mean to interrupt, but into whether common issues predominate over specific issues. And, you know, there is the common issue that's been identified, whether people received notice. That certainly is a common issue. But that's pretty easy one. That's not going to take up a lot of the Court's time. Or, frankly, a lot of the time of the parties involved.

I think the bigger issue is going to be the number of people, and whether or not they are eligible for WARN at a particular facility. And again, those are very different

issues for people in Ranson, which I understand is a larger facility. I'm not saying it meets the WARN standards, but it is a larger facility than maybe some of the other facilities.

And those issues at the different locations are going to predominate over the issue of whether people at any particular facility received notice.

THE COURT: All right. Thank you. Let me hear from the plaintiff?

MR. BOGGS: Thank you, Your Honor.

MR. GEFFERT: Your Honor, if I may, let me just address first the--well, the numerosity issue. We submit there is a parallel state court action currently pending which involves this payment--primarily, payment of the last check people just didn't get when they closed summarily. That class has been certified because it contains over--the Court has found it contains over 200 people. There are 185 individuals who through counsel have entered an appearance in that action.

We also have at a hearing to which Mr. Hare referred a reliance reply brief that took part--took in--placed in the bankruptcy case where Cathy Jo Van Pelt, who is a defendant in this action, testified that A B & C had about 500 employees as of March 14th. Now, even if only 20 percent of those are full-time employees, that's 100

people, which clearly meets numerosity requirement. There have been a number of depositions taken. No parties have ordered transcripts. And deposition testimony indicates about 75 percent of the employees were full-time employees. And therefore, covered by the WARN Act. So we think numerosity is not a problem.

With respect to the three facilities, A B & C was one business entity. The--again, at the hearing--the bank--bankruptcy hearing to which Mr. Hare referred, Ms. Van Pelt testified that the reason that all three facilities were closed on March 14th was because one bank failed to fund a common payroll account. Sovereign Bank. So they had no money to pay any of the employees. They are all in operation. In depositions taken last week, witnesses testified that the call centers shared their--the Orange, Virginia, operation was a call center, as was the Ranson call center. And most of the product was shipped out of Martinsburg. Shared the same client database. They shared the same programs. They shared the same protocols. They had staff meetings which interlocked. They had the same procedures. They were one organization.

In addition to that, the testimony, I think by Mr. Lutz, who is also a defendant here, at the bankruptcy hearing said all the equipment, the computers, the

conveyor belts, the programs, all of it, was just one A B & C operation and belonged to A B & C. And at the bankruptcy meeting said, it is all in those locations.

Plaintiffs have attempted and talked to the trustee about getting the records, because we would like to have them. The problem is that there are no paper copies of those records. They are all on a proprietary program located on an--on computers. Because of the way the place was shut down so suddenly, those files may or may not be wholly intact. And the estimate that we got from a computer specialist to get them was $10,000. Dave?

MR. HAMMER: About $10,000.

MR. GEFFERT: To try to get the records. And there's no way to get it, even for just the last 60 days. And that's why we haven't gotten them.

What we do have is, other than out of the bankruptcy proceeding and Department of Labor involvement, we have addresses for several hundred of the employees who were due their last checks on the last day, and who would be in the WARN class because they were people who were terminated on March 14th with no notice. So we think there's no real issue as to commonality. This is stuff that the defendant knows.

Also, nor is there any issue with respect to typicality, numerosity, it is all the same thing. All

plants closed on March 14th with no notice. At the instruction--Ms. Van Pelt also testified she got a phone call from defendants Coleman and (Pulsalini), I'm sorry, who told her, Close everything down. We have got no money to pay anybody on March the 14th. All of them subject to exactly the same action that gives rise to the WARN action. So we think we have met all of those.

Poppy Chrisman is not a new plaintiff. She is an original named plaintiff. She has responded to interrogatory answers--interrogatories, produced documents, was present at the mediation session that the parties held in an attempt to resolve this, and has had her deposition taken recently. She is a person we have identified as a class rep. because she is subject to the same action, closing without warning, which gives rise to everything. We think she is an adequate representative for all of the entities, the three operations here, because they are one integrated entity.

MR. BOGGS: Your Honor, may I respond to some of those points, if counsel is through?

MR. GEFFERT: Unless the Court has questions?

THE COURT: All right.

MR. BOGGS: Your Honor, first of all, counsel's characterization of evidence that has occurred at depositions is not evidence in and of itself. And counsel

is now trying to support a motion with statements by himself that aren't supported by evidence. So, I think it sort of goes exactly to my point, that counsel gets up here and feels the need to sort of supplant the single affidavit they have, supported with these things that happened in depositions. I would say that that is not evidence.

The other issue is this fact that there was simply a finding in another case about the number of employees at A B & C says nothing to whether or not the number of employees necessary at each facility has been met for purposes of WARN. Counsel represented that, well, even if you assume 20 percent. You can't assume anything. You have to put in evidence. And there is no evidence of the number of full-time employees. It could be one. I don't think it probably is, but they have an obligation to put that evidence in. And they haven't done that.

The final point, Your Honor, and I'll be brief, is that you don't treat all these employees as a single--as a single event. You do for determining whether or not the 100-person limit for an employer has been met. I concede that. But what I don't concede is whether what you look at, the number of employees for whether a particular facility and the employees at that particular facility are WARN eligible. The WARN Act regulations are very clear,

that you look at each facility. And the standard there is whether 50 full-time employees in fact were there at the time that the notice should have been given. So you don't group all of them in together for that purpose.

And so these statements about the number of employees, that it is 100 or 200 or 300, overall, is meaningless for purposes of certifying a class for WARN under Rule 23.

I don't know if you had any questions, Your Honor?

THE COURT: No, not yet.

MR. BOGGS: Okay, thanks.

MR. GEFFERT: Your Honor, if I could make just one point? Two points. One is, I disagree with the regulations. I think that they are clear that they are all together.

But the second point is, we did submit evidence upon Ms. Chrisman's interrogatories. Answers are before the Court. Another plaintiff, Eric Woomer, W-O-O-M-E-R, are before the Court. We have submitted the affidavit of Ms. Miller, which they don't contradict. They just say, well, it is just one affidavit. But we're not proving our case here.

The Fourth Circuit is clear, we don't address the merits here. We have produced evidence that there are more than 100 people easily who were affected by the closing. We have produced evidence that we submitted with

the brief of each of the factors on the interrogatory answers and the other documents we submitted.

And I point out the other stuff--the other factor--the other evidence and testimony that are here today, because it is developing, and it shows that there really isn't a dispute about any of these factors, other than that the defendants say there is. We have got the evidence. There's additional evidence that is going to be in discovery.

And the Court will recall part of the--it was stalled in bankruptcy because of a bankruptcy proceeding for a while, and parties have engaged in some settlement discussions, and also written discovery, before getting to the depositions testimony, I think in an effort to make it as efficient as possible. There's evidence by our attempt to settle it at mediation. It didn't work. But I think the parties have been working to try to keep it there. I think that regardless of whether the Court considers the additional things, and I brought copies of those, we have met our burden.

THE COURT: Wait a minute. Did I understand that these depositions were taken, but no transcripts have been ordered?

MR. GEFFERT: That's correct, sir.

THE COURT: Why is that?

MR. GEFFERT: Well, the depositions have been taken--have been taken by the defendants. And why they didn't order copies, I don't know. We haven't because they are our clients, and we know what they said. And we don't feel that we need them at this point. Usually the party who takes the deposition orders the transcript.

THE COURT: All right. Do I understand that the Martinsburg facility did not have a call center?

MR. GEFFERT: That's correct, sir.

THE COURT: And I'm jumping ahead here a little bit. How would the Martinsburg facility be suitable for the FLSA claim?

MR. GEFFERT: Well, we don't think that the individuals there have a claim. We said so in our reply brief. What we have--the reason we have proposed to do the notice as we have, was with one notice going out is, in part, to simplify things, and also to keep costs down. I mean, because the FLSA--FLSA is an opt-in class, and because the class notice talks about the overtime and describes what the class is, or at least our proposed notice, we expect we wouldn't get cards back from those people. And if we do get some cards, opt-in cards back from people who don't have those claims, we haven't pursued weeding them out, and we will, because they don't have any claims. But that's a simple matter of finding

out where they worked.

THE COURT: Okay. Do--if I grant the motion, what kind of a deadline do we need to get cards in?

MR. GEFFERT: To get them back?

THE COURT: And could you speak into the microphone, sir?

MR. GEFFERT: I just want to make sure I don't misrepresent something with my cocounsel here. We expect 90 days within which to reply. Ninety days gives time for cards to come back where the addresses that we had, although they were current as of March 14th, 2008, they may have moved on. Forwarding addresses expired. We can get them back and try and locate new addresses for them. And gives us adequate time then to send it back out. My experience has been that 90 days will usually be sufficient for that.

THE COURT: Is that going to threaten the trial date?

MR. GEFFERT: I don't anticipate that it would, Your Honor.

THE COURT: I can't hear you, sir.

MR. GEFFERT: I'm sorry. I don't think--I don't anticipate that it would threaten a trial date. Because that only--that will affect who is in the class, has less to do with how the case is resolved than it does with

damages. And I would anticipate that as we get closer to trial, the Court will--might want to look at having a trial on liability. And after that, figuring out the damages. That's been a common way of doing it, both in the Warn Act cases, a couple of which we have cited in our reply brief, and it has also been one way of figuring out damages in the FLSA claims. Just because by the nature of any of these things, there are some individual determinations to be made. I believe that's the way we did it in a case that--to which we referred, which was tried before--or handled by Judge Broadwater, Kidrick_v._ABC_Rental, where we had both an FLSA opt-in and a state law wage claim. We resolved the merits of that first, and addressed issues of liability. And my recollection is once liability was determined, parties were able to work among themselves and resolve issues about damages, because they are largely arithmetical.

THE COURT: Do you wish to present any testimony today?

MR. GEFFERT: No, sir.

THE COURT: Thank you. Does the defendant wish to present any testimony today?

MR. BOGGS: No testimony, Your Honor. I don't think we need to. But I would like to speak, unless Your Honor doesn't--would not like me to, on the FLSA piece of

the class certification issue. On the collective action. Because I think that even more than the WARN action, there are a lot of individualized issues that I would like to explain, Your Honor, as to why liability for any particular individual is going to require individualized analysis. And if Your Honor would like me to approach, I could explain that?

THE COURT: Go ahead.

MR. BOGGS: Thank you, Your Honor. Your Honor, first I'd like to say that similar to Rule 23, 216(b) of the FLSA also requires that evidence be produced on the very issues on whether or not the claims are similarly situated. Again, that evidence has not been presented here.

But on the merits, whether or not a particular person is eligible, or whether the company could be liable to them for overtime for time worked off the clock, is going to require a very individualized analysis. It is not simply damages. It goes directly to liability.

There has been--there has been no evidence about the number of people that worked over 40 hours a week off the clock. In fact, the testimony that has occurred in the depositions indicate that many of these people only took three to five minutes to log on to the computer. That the computers were already on, that it was three to five

minutes, which is lower, or two to five minutes, which is less time than the three to seven minutes, depending on which of the plaintiffs you believe. They were allowed to log in before their start time was to start. So, what you would have to do to determine whether any particular person is entitled to overtime is to interview them, ask them--or depose them: When did you start to work? How long did it take you to turn the computer on? How long did it take to you log in to the programs? Did you log in to the programs before you started work or after you started work? Did you work 40 hours a week, or were you simply a part-time person?

All of these issues would have to be asked, not as regard to damages, Your Honor, but liability. Because unless all of those are in the affirmative, there can't be liability for those people.

So to certify a class that requires an individual analysis of those factors is completely inappropriate under the thin, thin record that's been presented to Your Honor. You know, frankly, Your Honor, with all due respect, I don't understand that there would be sufficient evidence before you to even write opinions on these two issues. But on this case in particular, what happens for each individual person and how much time it takes for them to log on to the computer and log on to the program is

going to go directly to liability. And so far the evidence that has come out at the deposition, which again is not our burden to present, has suggested there is wide variances on that particular issue.

Do you have any questions, Your Honor?

THE COURT: Well, if someone was working less than 40 hours and not being paid for working off the clock, why wouldn't that be compensable under Fair Labor Standards?

MR. BOGGS: Well, it might be, Your Honor. But I think it is also compensable under the state class action that's already been certified. This claim, as identified, is limited to the overtime piece.

THE COURT: I thought the state claim was strictly a Wage Payment and Collection Act for the unpaid final check?

MR. BOGGS: I don't think it is that limited to that, Your Honor. If counsel says it is, then I may be corrected. But I understood that this case was limited to the overtime that the others asserted for any unpaid wages, and it wasn't limited in any way. But I may be misreading their complaint. But on the face of it, it doesn't seem to be so limited.

And in the--and the way that this complaint is drafted, which this overtime claim wasn't even a part of

their original complaint. It was tacked on later on. It was originally just a WARN claim. This is sort of an afterthought. And the number of people that are going to be eligible for overtime, excuse me, again it is limited to the call centers which Your Honor already found. But not only at Martinsburg would be eliminated, but many of the employees at the other facilities would not be part of this class and should not receive a notice unless you are a call member.

But in addition to that, we believe it is limited to overtime on the face of the complaint. And therefore, you would have to look and see whether these people had worked already 40 hours in any particular week, and then whether they had worked beyond 40 hours. And more than a de minimis amount. So them working de minimis, which they wouldn't be entitled to the time if it is only a minute a day, something like that. It has to be something more significant. There's no way of knowing that, especially given the nature of the allegations and the testimony. Some of these people didn't work any time over their regularly scheduled time because they were able to turn on and log in to the computer in the time period that they were allowed to log in--excuse me, to punch in, before they started work.

THE COURT: Thank you.

MR. BOGGS: Thank you, Your Honor.

THE COURT: Mr. Geffert?

MR. GEFFERT: Yes, sir?

THE COURT: Tell me what the allegations in the state proceedings are. I understand you have got a Wage Payment and Collection for the final unpaid check. Is there anything else?

MR. GEFFERT: Yes, sir. Mr. Boggs actually characterized that correctly. There are two claims. One is just for the last check. And then there is also a claim for straight time wages only. That is, the--for hours which were worked, but for which they were not paid. But that court case does not seek overtime.

In this case we're only looking at--

THE COURT: Why? Why separate them?

MR. GEFFERT: Because we wanted to keep one case in state court and one in federal court, Your Honor. We had hoped to get a little quicker result on the wage payment part of it because it is a clearer issue. And: Did you get the check? You didn't get the check? And hopefully get their money quicker. It didn't work out, but that's--that was our thinking.

If I may address, Your Honor, the issue about the FLSA? This is not--it is an opt-in class, and the cases are clear that we don't have to meet--there is no--that

Rule 23 requirements do not apply. What you do have to show is that there was some common practice or policy that was applied to the potential class members. And that practice and policy is that individuals, and Ms. Chrisman's affidavit and Ms. Miller's affidavit, as well as interrogatory answers, show they have to log in to--had to get to their shift position 15 to 20 minutes early because it took that long to boot up the computers, so that they could be ready to perform their functions at the beginning of the shift, which they were required to do.

Now, Mr. Boggs is correct, there was some testimony at a deposition recently that for a small subgroup of employees, who were new employees and had fewer--had been trained on fewer of the programs or fewer of the customers, that it didn't take that long to log in. But that's a small subset of the employees.

Mr. Boggs is also correct that at some point we'll have to figure out who worked overtime and how much. But that is a case with every single FLSA opt-in case. It is always the same. Under Mr. Boggs' argument, 216(b) would be absolutely meaningless because of the individualized determinations that you have to make at some point for any employee, because they all are. Mr. Boggs' argument would eliminate a long line of donning and doffing cases that have been developed throughout the years in the federal

courts where they have been allowed even this. They--though people arrive at different times there, they have to be determined who dressed quicker than the other person. What equipment did they have to do? How long did it take? That's an FLSA problem.

But what the FLSA collective action allows the Court to do is first determine whether there was practice and policy of requiring or suffering or permitting people to come in, do work for which they were not paid, and whether that practice was lawful. That is the issue which the Court decides under 216(b) case. And then after that, you move to figure out who gets what. And the evidence--the two affidavits, the interrogatory we presented--well, Ms. Chrisman's interrogatory answers and Ms. Miller's affidavit say that's the practice and a policy. And that's sufficient for the showing we have got to make here.

Plus in a 216(b) case, the Court--the cases contemplate that the Court makes an initial determination that there is some showing that there is a practice and policy, and in which more than one person may be affected. We send out the notices, and if it turns out Mr. Boggs is correct and there really aren't any class members for that, the Court can then revisit that issue and decertify the FLSA class. That is the standard means of proceeding

in the FLSA class action cases.

So we think we have met the 216(b) standard, especially since it is a much lower standard than is required for the Rule 23 cases because of the very nature of FLSA claims of this type.

And, the other part of it is, Mr. Boggs says there are some determinations about--making--who did what? But that's really because of the deficiencies of the defendant. The law has been clear now for 60 years that employers have a responsibility to keep pay records. And when they don't, and when they don't keep them in a form that is easily accessible, and the FLSA regulations have required that for 40 years they be kept in a manner so that--this is in part 16(b) of the (29C FCR,) that they are required to keep them in a form so they can be retrieved within 72 hours. And that's so if the Department of Labor comes knocking, they say we're going to be there, let us look at your pay records. And that's been the law for 40 years. And if they don't have them, the law says that's their problem. And the Supreme Court announced that position in the Clemmons case 60 years ago.

And the definition of who is an employer for the FLSA purposes have to do with operational control, and which can extend farther up the ladder than other statutes.

So, we think that that--for FLSA purposes, for 216(b)

purposes, we think we have shown there is a common practice. We have shown that there are more than one person affected by it. The deposition testimony when we get the transcripts will support that. But we have enough.

The Court can certify that class. We send out the notices. And if it turns out that that doesn't apply, defendants have the option of moving to decertify the class, and the Court can revisit it. That's standard FLSA collection practice.

THE COURT: Thank you.

MR. BOGGS: Your Honor, may I speak real briefly to a couple points?

THE COURT: Sure.

MR. BOGGS: Your Honor, there's no evidence at all of not keeping and maintaining records at all. So the reference to that should be ignored.

The other thing that I had forgotten to say earlier is that you may remember, Your Honor, that the Department of Labor is in the process of getting many of these individuals paid their back wages. And as part of that, evidence has come out that these people are being required to sign a waiver of any claims that they have for unpaid wages.

My understanding from the testimony is that some

people have conceded that they have signed those, which again will require an individual analysis on whether or not somebody has signed a waiver of these kind of claims or not.

I think the most important concession that we just heard is that this is limited to overtime. And although the donning and doffing cases that counsel identified, he's correct, that involves not being paid for the time. This case only involves overtime. And because of that limited component, this is certainly going to require an individual analysis as to liability, not simply damages. Thank you.

THE COURT: Excuse me, who is making them sign these waivers?

MR. BOGGS: The Department of Labor. There has been money funded to the Department of Labor that they are going to be recovering, my understanding is, near or full amounts that these folks are entitled to. In exchange for that, the Department of Labor is requiring them to sign waivers of any claims that they may have for those amounts. And it is our position that those claims would limit their ability to recover any claims here, or in the other cases. And it would require us to decide, well, who has signed those waiver and who hasn't. And again, that's why it is going to require some individual analysis.

THE COURT: All right.

MR. BOGGS: Thanks, Your Honor.

MR. GEFFERT: If I may, Your Honor, speak to the issue of the waiver? The Department of Labor is recovering only minimum wage. That's it. That's the focus, because that's what they do.

THE COURT: Into the microphone. I can't hear you.

MR. GEFFERT: FLSA, their focus is recovering the minimum wage, because they have no enforcement authority beyond minimum wage. Or if they should find overtime, but they are not investigating overtime.

Secondly is the Department of Labor does not require people to sign waivers. They have a form that accompanies a check that says, I got the money. It is a receipt. It is not a waiver of any other claims, because the Department of Labor, as matter of policy, does not do that and has not done that.

I have never--been doing these cases for 30 years, Your Honor, some with the Department of Labor, and I have never seen a waiver. And in fact, their standard form is just that. It is a receipt.

MR. BOGGS: Your Honor, I apologize if I misspoke, but that was my understanding of the testimony that came out at the depositions. That it was going to be

a release of any future claims. In any event, it is not a minor point, but it is a point.

MR. GEFFERT: I would point out that that same issue is one of the Warn Act cases we cited in our reply brief. One of the defenses raised by the employer in that case was an allegation that certain class members had signed waivers or arbitration agreements. And in the Rule 23 context, the Court in that case said, well, maybe, but what predominates is the policy and the practice. And those other issues are subservient to it and could be addressed at a later time. We have got the same situation here in the 216(b) case. And, again, if there are waivers that are signed, I mean, they are easily obtained. We can get them from the FOIA request. They can be produced, and the Court can then make a subsequent follow-up decision on whether or not the 216(b) case should be decertified, which is common FLSA procedure.

THE COURT: Thank you. Anything else?

MR. GEFFERT: Not for the plaintiffs, Your Honor.

MR. BOGGS: None for the defendants, Your Honor.

THE COURT: All right, thank you.

(Proceedings were adjourned.)

I hereby certify that the foregoing is a correct transcript from the record of proceedings stenographically reported and transcribed in the above-entitled matter.

/s/ *Terry C. Hamrick*
Terry C. Hamrick, RMR, CRR
Official Reporter